

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

LEE TRACE LLC,
Petitioner,

v.

BERKELEY COUNTY COUNCIL AS
BOARD OF REVIEW AND EQUALIZATION,

and

CIVIL ACTION NO. 15-AA-5

BERKELEY COUNTY COUNCIL,

and

LARRY HESS, AS ASSESSOR FOR
BERKELEY COUNTY, WEST VIRGINIA,
Respondents.

FILED
2015 APR -9 PM 2:31
MICHAEL SHAW, CLERK

RESPONSE OF RESPONDENTS BOARD OF REVIEW AND EQUALIZATION,
BERKELEY COUNTY COUNCIL

And

LARRY A. HESS, ASSESSOR OF BERKELEY COUNTY

COME NOW, the Berkeley County Council, sitting as the Board of Review and Equalization and the Berkeley County Council, governing body of Berkeley County, and Larry A. Hess, Assessor of Berkeley County, by counsel, and respond to the Petitions herein, as follows.

1. That, they admit the allegations set forth in Paragraph 1 of the Petition. (As an aside, Petitioner indicates in its footnote #1, on page 3 of the Petition, that the Assessor incorrectly listed the deed as having been recorded in Deed Book 849, at page 244, on the 2015 Commercial/Industrial Review Document; that, the correct Deed Book and page number are 838/231. The Assessor listed the deed book and page numbers from a deed

of correction filed subsequent to the recordation of the original deed and, thus, the difference in numbers.)

2. That, they admit that Petitioner's account of what the Petition seeks is accurate as set forth in Paragraph 2.
3. That, they admit the procedural status of this case is as presented in Paragraph 3.
4. That, Respondents suggest that the allegation set forth in Paragraph 4 of the Petition is vague. To the extent the Rules of Civil Procedure require a response, Respondents deny the same.
5. That, as to the allegations set forth in Paragraphs 5 and 6, Respondents admit the same.
6. That, with regard to the allegations set out in Paragraph 7, Respondent Council and Respondent Assessor admit that Mr. Noble testified that the cost approach utilized to produce the Assessor's 2015 assessment of the subject real property was flawed. They deny that the appraisal was un rebutted and admit that the Assessor presented testimony through himself and Tamera Edgar. Further, Respondents admit that Mr. Noble testified, placing the true and actual value of the subject property at \$7,000,000.00 and the assessment at \$4,200,000.00.
7. That, they admit the allegations set forth in Paragraphs 8, 9, 10 and 12.
8. That, as to the allegations set forth in Paragraph 11 of the Petition, Respondents deny the same.
9. That, with regard to the allegations set forth in Paragraph 13, Respondents deny the same and note that this State's Supreme Court in *Lee Trace LLC v. Raynes*, 232 W.Va. 183, 751 S.E.2d 701 (2013), affirmed the Assessor's assessment for Tax Year 2011, finding that Petitioner had not made objection to the cost approach utilized by the Assessor in

making the assessment for that tax year. Further, subsequent assessments have not met the statutory threshold for Notice of Increase.

10. That, with regard to the allegations set out in Paragraphs 14, 15, 16 and 17, they deny the same.

11. That, as to the allegations set out in Paragraph 18 of the Petition, Respondents admit that the constitutional and case law set out in the Paragraph are, as general concepts, accurately set forth.

12. That, they admit that West Virginia Code § 11-1C-1 (a) provides that "all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly...", all as set forth in Paragraph 19 of the Petition.

13. That, Respondents admit the generalization made by Petitioner in Paragraph 20 with regard to the Equal Protection Clause of the Fourteenth Amendment but, they deny the implication that taxation of the subject property has been done in a discriminatory manner.

14. That, they admit the allegations set forth in Paragraph 21.

15. That, they deny the allegations set out in Paragraph 22.

16. That, they admit that the Board made no reference to equalization in its Order of February 26, 2015, and that, in its role as Board of Review and Equalization, Council presented no evidence on any issue, including equalization, all as alleged in Paragraph 23.

17. That, with regard to the allegations set forth in Paragraph 24, Respondents deny that Mr. Noble's testimony on the true and actual value of the subject property was un rebutted and that the Noble testimony was ignored by the Board. In point of fact, the Assessor did,

indeed, rebut the Noble testimony and the Board addressed the Noble testimony in its Order of February 26, 2015.

18. That, with regard to the allegations set forth in Paragraphs 25 and 26, they deny the same.

19. That, with regard to the allegations set out in Paragraph 27, Respondents deny that Mr.

Noble conducted an appropriate, statutorily legitimate income approach valuation of the subject property.

20. That, they admit that Mr. Noble testified that the subject property's taxes were not equalized with those of comparable properties in Berkeley County, as alleged in Paragraph 28..

21. That, they admit that Mr. Noble testified as he is alleged to have testified in Paragraph 29.

22. That, they admit that Mr. Noble testified that there was a 2% difference in the ratio of taxes to gross income between Petitioner and Pheasant Run, all as alleged in Paragraph 30.

23. That, they deny the allegations set forth in Paragraph 31.

24. That they admit Petitioner's recitation of West Virginia Code § 11-3-27 (a) but deny that when section 27 provides that the "county commission" is to correct clerical errors or mistakes discovered over the year in an assessment, it is the Board of Review and Equalization which is, therefore, directed to perform the exoneration, all as alleged in Paragraph 32.

25. That, as to the allegations set out in Paragraph 33, Respondents admit that during the February 12, 2015, hearing, Tamera Edgar testified an adjustment was made for "**all of the apartments**". And we adjusted the land based upon the footprint of the buildings for

the prime site. The footprint of the paving, the sidewalks for the secondary site. And we adjusted that for Lee Trace." (Emphasis added). She did testify that, "Evidently, it was calculated too high the first time. But it was not that the buildings were measured wrong. The buildings were measured correctly. It was just the calculation to do the land [that] was incorrect." The land assessment was lowered "a small amount" as a result of the adjustment in how much of the land area was Primary; how much Secondary; and, how much was undeveloped. The adjustment was not due to a mistake or clerical error but, rather resulted from the Assessor's Office using its discretion and judgment to make such adjustments.

26. That, with regard to the allegations set forth in Paragraph 34, Respondents admit that, at the time of the filing of this Petition, the Assessor had not yet begun the process to grant exoneration to the Petitioner based upon the adjustment made to the calculation on the land.
27. That, Respondents admit that the Board's February 26, 2015, Order did not adjust or correct the alleged errors which are the subject of part of Petitioner's Petition and as alleged in Paragraph 35. The Board's action dealt with the propriety of the 2015 assessment. The Council, not the Board, acts upon applications for exoneration.
28. That, with regard to the allegations set out in Paragraphs 36 and 37, Respondents admit that the recitation of law is as made by Petitioner.
29. That, with regard to the allegations set out in Paragraph 38, Respondents deny that the Court should render a judgment, pursuant to West Virginia Code § 11-3-27, ordering the Board of Review and Equalization to grant Petitioner's exoneration.

30. That, with regard to the allegations set out in Paragraph 39, Respondents deny that the Court should issue a Writ of Mandamus to compel the Assessor to apply for correction of the admitted clerical errors pursuant to West Virginia Code § 11-3-27. The Assessor has no "nondiscretionary duty" to apply for correction of the perceived errors noted by Petitioner. The Assessor has discretion in deciding which of two methods for resolution to make: (1) the assessor may notify the taxpayer to make application; or (2) he may make application himself. In addition, here, the Assessor may have made a mistake but, it was not a clerical error or a mistake occasioned by an unintentional or inadvertent act. Accordingly, it is not one from which an exoneration would occur.

31. That, with regard to the allegations set forth in Paragraphs 40 and 41, the Respondents deny that the Assessor has any legal duty to make an application for correction himself or to advise Petitioner that it may make such application. Further, it is irrelevant that Petitioner has no remedy other than compelling the Assessor to apply for the correction, since the error was neither clerical nor occasioned by an unintentional or inadvertent act but, rather was an intentional act of judgment.

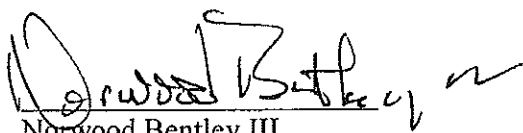
WHEREFORE, the Respondents jointly request this Honorable Court to deny the Petition for Appeal sought herein; to deny the Petition for Writ of Certiorari and/or the Writ of Mandamus; and, for such other and further relief as the Court may deem appropriate and proper.

**BERKELEY COUNTY COUNCIL, AS COUNCIL AND AS
BOARD OF REVIEW AND EQUALIZATION**

By Counsel

LARRY A. HESS, ASSESSOR OF BERKELEY COUNTY

By Counsel




Norwood Bentley III
State Bar No. 4234
Berkeley County Council
400 West Stephen Street, Suite 201
Martinsburg, West Virginia 25401
304-267-5009
nbentley@berkeleywv.org

CERTIFICATE OF SERVICE

I, Norwood Bentley III, do hereby certify that I have served a true and accurate copy of the foregoing RESPONSE OF RESPONDENTS BOARD OF REVIEW AND EQUALIZATION, BERKELEY COUNTY COUNCIL and LARRY A. HESS, ASSESSOR OF BEKELEY COUNTY upon the following, by placing the same in the United States mail, postage pre-paid, and directed as indicated hereinbelow, on this the 9th day of April, 2015.

Thomas Moore Lawson, Esquire
Lawson and Silek, P.L.C.
Post Office Box 2740
Winchester, Virginia 22604


Norwood Bentley III

respappptlectrace15aa5

2015 APR -9 PM 2:31
VIRGINIA M. SILEK, CLERK